THE SUPREME COURT OF THE STATE OF MICHIGAN
APPEAL FROM THE COURT OF APPEALS

KIMBERLY CORL,
Personal Representative of the ESTATE OF BRADLEY SCOTT CORL,
DECEASED,

Plaintiff-Appellee,

-vs-

RAILAMERICA, INC.,
AND HURON AND EASTERN
RAILWAY COMPANY, INC.,

Defendants-Appellants.

Supreme Court Case No. 150970

Court of Appeals Case No. 319004

Tuscola County Case No. 11-26733-NI
Hon. Amy Grace Gierhart

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REPLY IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL OF DEFENDANTS-APPELLANTS RAILAMERICA, INC., AND HURON & EASTERN RAILWAY COMPANY, INC.

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I. The Court of Appeals' decision in this matter directly conflicts with the Court of Appeals' decision in *Paddock v. Tuscola & Saginaw Bay Ry. Co., Inc.*, 225 Mich App 526, 571 NW2d 564 (1997), and calls into substantial question the validity of MCL 462.317 of the Railroad Code of 1993.

The issues presently before this Court are whether the Court of Appeals' decision conflicts with another decision of the Court of Appeals, whether the decision is clearly erroneous and will cause material injustice, or whether the decision involves a substantial question as to the validity of a legislative Act.

It is undeniable that the Court of Appeals' decision here directly conflicts with another decision of the Court of Appeals: *Paddock v. Tuscola & Saginaw Bay Ry. Co., Inc.*, 225 Mich App 526, 534, 571 NW2d 564 (1997). The best Plaintiff can muster in response is the bald assertion that "*Paddock* did not intimate, let alone hold, that the railroad's common law duties to maintain a safe crossing, including the duty to maintain safe lines of sight and to remove obstructions, including vegetation, were in any way affected by MCL 462.317." (Response p. 8). That statement is simply inaccurate.

Both Plaintiff and the Court of Appeals attempt to distinguish *Paddock* by claiming that a "careful reading" of *Paddock* shows that it was limited to the duty to petition the road authority to act. But *Paddock* was not so limited. It clearly stated that, "Under the plain language of this statute, it is the responsibility of the road authority—not the railroad—to determine the need for a clear vision area." *Paddock*, 225 Mich App at 534. Indeed, it was on that basis—the lack of a duty—

that *Paddock* concluded that a railroad likewise has no duty to petition the road authority to act by citing this Court's holding that "where a railroad has no duty to do a certain act, it also has no duty to petition for someone else to do the act." *Id.* In other words, under *Paddock* the railroad has no duty to determine the need for a clear vision area, but under the decision here the railroad has such a duty. Both cases cannot be correct. The conflict is clear.

In addition, by Plaintiff's own admission, Plaintiff is questioning "the validity of a legislative Act." According to Plaintiff, "The only conclusion is that MCL 462.317 is a poorly drafted, ineffective statute." (Response p. 11.) If the statute supported Plaintiff's position here, Plaintiff would not be making such a statement.

Plaintiff contends that the statute places no obligation on the road authority to act to remove visual obstructions. This again is simply incorrect. The stated purpose of the Railroad Code of 1993 was not only "to revise, consolidate, and codify the laws relating to railroads," but "*to prescribe powers and duties of certain state and local agencies and officials*." Railroad Code of 1993, 1993 Mich. Legis. Serv. P.A. 354 (S.B. 646) (Emphasis added.) Indeed, under MCL 462.131, "To the extent provided in this act, the [Michigan Department of Transportation] shall have and exercise regulatory and police power over railroad companies in this state insofar as such power has not been preempted by federal law or regulation." One of those powers is determining the need for a clear vision area at railroad crossing.[1]

[1]The removal of vegetation obstructions is not preempted by federal law or regulation. *Shanklin v. Norfolk Southern Railway Co.*, 369 F3d 978 (6th Cir. 2004).

Under MCL 462.317(1), "*If a road authority determines to establish a clear vision area as described in this section,* the railroad and a road authority may agree in writing for clear vision areas with respect to a particular crossing. The portions of the right-of-way and property owned and controlled by the respective parties within an area to be provided for clear vision shall be considered as dedicated to the joint usage of the railroad and the road authority." (Emphasis added.) This clearly places the onus on the road authority. Indeed, as stated by this Court in *Turner v. CSX Transp. Inc.*, 198 Mich App 254; 497 NW2d 571 (1993), "[T]he duty to consider corrective actions at a railroad crossing lies with the governmental entity with jurisdiction over the roadway, and not with the railroad." *Turner* at 256-257; *Paddock* at 534.

Plaintiff contends that pre-1993 case law addressing a prior version of the statute supports Plaintiff's position here, but it does not. To the contrary, it strengthens the Defendants' position. As noted by Plaintiff, the prior statute applied "[w]henever the railroad company or railroad companies and public authorities having jurisdiction over such highway shall agree . . . ." MCL 469.6. Conversely, the present statute only applies "[i]f a road authority determines to establish a clear vision area as described in this section . . . ." MCL 462.317(1).

Plaintiff argues that this changed and added clause is meaningless, but an "interpretation that renders language meaningless must be avoided. *Nat'l Pride At Work, Inc. v. Governor of Michigan*, 481 Mich 56, 70, 748 NW2d 524, 534 (2008). "It is a cardinal rule of statutory interpretation that 'effect shall be given to every

word, phrase, or clause of a statute.'" *People v. Babcock*, 469 Mich 247, 276, 666 NW2d 231, 246 (2003), citing *Robertson v. DaimlerChrysler Corp.,* 465 Mich 732, 757, 641 NW2d 567 (2002). When construing a statute, every word "should be given meaning and no word should be treated as surplusage or rendered nugatory if at all possible." *Baker v. Gen. Motors Corp.*, 409 Mich 639, 665, 297 NW2d 387, 398 (1980). Following those rules of statutory construction, the added clause in MCL 462.317 has meaning, and its meaning is that the road authority, not the railroad, determines the need for a clear vision area.

Again, although Plaintiff contends the common law has not been abrogated, Plaintiff cannot identify a single case since the enactment of the Railroad Code of 1993 holding that a railroad has some independent duty to create a clear vision area by identifying and removing vegetation. Surely there would be at least one such case in the last twenty years if the law is what Plaintiff claims it to be. There is not, so instead Plaintiff cites to pre-1993 case law that addressed a prior statute that was not part of an Act to "to prescribe powers and duties of certain state and local agencies and officials" and that did not limit its application to instances where the road authority determines the need for the clear vision area. That case law is clearly inapposite. There is no support for Plaintiff's proposition that following the enactment of the Railroad Code of 1993, a railroad has a duty to identify and remove vegetation at crossings to create a clear vision area.

In short, per MCR 7.302(B)(1) and (5), the decision below directly conflicts with the *Paddock* decision, questions the validity of MCL 462.317, and is clearly

erroneous and will cause material injustice. Accordingly, Defendants respectfully request that this Court grant the Application for Leave to Appeal.

II. The Court of Appeals' decision in this case directly conflict with Michigan Supreme Court precedent and whether Michigan continues to follow the "physical facts rule" has major significance to Michigan tort law and criminal law.

Assuming arguendo that the railroad has a duty to remove vegetation at the crossing, Plaintiff has to prove two things: (1) there was vegetation obstructing a driver's view, and (2) such obstruction caused Mr. Corl to drive his vehicle onto the tracks. The only evidence in the record directly refutes both contentions, but the Court of Appeal nonetheless held there were genuine issues of material fact.

The issues raised in Defendants' Application are whether the Court of Appeals' decision in this case directly conflicts with Michigan Supreme Court precedent and whether Michigan continues to follow the "physical facts rule," which has major significance to Michigan tort law and criminal law. The Court of Appeals has ignored that rule by finding a fact issue with respect to the presence of obstructive vegetation, while simultaneously finding that the photographs show no obstructive vegetation. *Estate of Corl ex rel. Corl v. Huron & E. Ry.*, No. 319004, 2014 WL 7338915, at *4 (Mich. Ct. App. Dec. 23, 2014). So the question is whether unsupported expert opinion testimony can be given probative value in light of photographs proving physical facts.

Until now, the answer has been "No." As this Court has held, a "Plaintiff has no constitutional right to have a determination of facts by a jury inconsistent with the undisputed physical facts of the case." *Van Gilder v. C. & E. Trucking Corp.*,

352 Mich 672, 675-76, 90 NW2d 828, 831 (1958). This case is unique in that the Court of Appeals acknowledges that the physical facts are not in dispute, but nonetheless holds that a genuine issue of trial exists. By doing so, the Court of Appeals failed to follow Michigan Supreme Court precedent. That failure is grounds for review by this Court.

The photographs of the crossing taken around the time of the accident conclusively prove the view of the locomotive was unobstructed when Mr. Corl arrived at the crossing.[2] (Ex. H, Greiger Aff., Exs. A-1 through A-13, attached.) It is worth repeating that based upon time and speed calculations, the locomotive would have been less than 555 feet from the crossing when Mr. Corl first arrived and stopped, and the locomotive would have been extremely close to the crossing when Mr. Corl's vehicle rolled forward in order to collide with Mr. Corl's vehicle. As shown in the photographs, there can be no debate that the locomotive is plainly visible, and that is especially true in those photographs from within 500 feet. (Ex. H, Greiger Aff., Exs. A-10 through A-13.)

Plaintiff does really not dispute what the photographs show, but merely questions Mr. Greiger's "expertise" (as if that somehow changes what is reflected in the photographs), and further questions whether the photographs were taken from a vehicle or from outside a vehicle, and at what height. Of course, none of that

[2] Plaintiff claims that the Affidavit of Weldon Greiger is missing a page and "his attestation only goes to the first six photographs." (Response p. 14.) Upon review, Plaintiff is correct that a page containing more detailed descriptions of the photographs appears to be have been missed in the scanning process. Nonetheless, Plaintiff is wrong about the attestation. Greiger attests to the accuracy of *all* of the photographs in paragraph 2 of his Affidavit.

matters because the type of vehicle quite obviously does not change the vegetation; it is either there or it is not, and the photographs show it is not. The testimony of Plaintiff's expert should be given no probative value in light of the fact it is directly contradicted by photographs.[3]

As to causation, Plaintiff is playing fast and loose with the facts. Plaintiff contends that "the evidence establishes that Mr. Corl stopped at the crossing, and was seen to lean over to his right, over the passenger seat in the direction of the approaching train." (Response p. 13.) But nobody who saw Mr. Corl said that he was looking for, or in the direction of, the locomotive.

The locomotive engineer, Russell Page, was asked directly in deposition whether it looked "like [Mr. Corl's] trying to look down the tracks" and his response was, "No. He was laying down across the seat like he was picking something off the floor or something." (Page Dep. 16–17.) Plaintiff further omits the fact that Page testified he could see Mr. Corl's head up to the point of impact and he was never looking for the locomotive. (Page Dep. 18, 26, 27.)

To combat this, Plaintiff argues that an earlier statement of Page did not have such detail and "is inherently incredible." (Response p. 15.) But Plaintiff has a duty to present evidence. Plaintiff "may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial. If

[3] The expert whom Plaintiff calls "one of America's preeminent rail crossing experts" has a habit of opining about obstructions that do not exist when looking at photographs. (See cases cited at page 19 of Defendants' Application for Leave.)

the adverse party does not so respond, judgment, if appropriate, shall be entered against him or her." MCR 2.116(G)(4). Plaintiff cannot defeat a properly supported summary disposition motion by merely hoping a jury disbelieves the evidence. "[I]t is not a legitimate inference to draw from testimony denying the existence of a fact sought to be proved, that such denial is evidence that the fact exists." *Ykimoff v. Foote Mem. Hosp.*, 285 Mich App 80, 118, 776 NW2d 114, 136 (2009), citing *Quinn v. Blanck,* 55 Mich 269, 272, 21 NW 307 (1884). "Although it is true that a jury is free to disbelieve uncontradicted testimony, this principle does not supplant the requirement under MCR 2.116(G)(4) that a party opposing a motion for summary disposition under subrule (C)(10) must produce some evidence showing that there exists a genuine issue of material fact for trial." *Stapleton v. State Farm Mut. Auto. Ins. Co.*, No. 273392, 2007 WL 2118784, at *2 (Mich. Ct. App. July 24, 2007). As stated in that case:

> Irrespective of who has the burden of proof at trial, the nonmoving party cannot survive a motion for summary disposition pursuant to MCR 2.116(C)(10) without some affirmative showing that a genuine factual issue actually exists for trial. Defendant failed to do so, asserting only that the jury might plausibly choose to disbelieve plaintiff's theory. As the trial court admonished defendant below, "if that argument is the test, a party can always come in and say, well, we don't really have any evidence to contravene what's been said except we just don't believe him. So therefore there's got to be a trial." As the majority explained, the nonmoving party may not survive a motion for summary disposition by denials alone.

Id. at *4 (Mich. Ct. App. July 24, 2007). *See Douglas v. Ford Motor Co.*, No. 306231, 2013 WL 2460051, at *9 (Mich. Ct. App. June 6, 2013) (a plaintiff is not permitted to rely solely on evidence that a jury could disbelieve the employer's proffered

legitimate, non-discriminatory reason, but must submit evidence of a discriminatory reason); *Copeland v. Family Dental Ctr.*, No. 212862, 2000 WL 33407433, at *1 (Mich. Ct. App. Aug. 18, 2000) ("It is improper to rely upon untruthful testimony to establish the truthfulness of an inverse factual proposition.")

Moreover, the only other witnesses, Willis and Loretta Johnson, directly contradicted the notion Corl was looking for the locomotive. According to the Johnsons, Mr. Corl not only leaned over as if to pick something up, but his head disappeared below the dashboard and remained there up to and including the time of the collision. (Ex. B, W. Johnson Aff. ¶ 4; Ex. C, L. Johnson Aff. ¶ 4.)

At the time Mr. Corl pulled forward, the locomotive practically would have been at the road's edge (Ex. H, Greiger Aff., Exs. A-10 through A-13.)[4] When taking into account the photographs and the testimony, no inference can be drawn that Mr. Corl was "desperately attempting to look for a train." To draw such an inference, you would have to conclude that Mr. Corl (1) did not hear the train horn, (2) did not know why the Johnsons were stopped on the other side of the crossing, (3) was looking for the train by placing his head below the dashboard of the vehicle while pointing his head to the ground, (4) could not see a train that would have been

[4] Mr. Corl was stopped at the crossbucks, which were approximately 15 feet from the tracks. (Ex. A., Venturino Aff., p. HESR/Corl000444.) The locomotive was moving at 24 to 25 mph (36 to 37 feet per second.) If Mr. Corl's vehicle was moving as slow as 1 mph (1.466 feet per second), it would have taken around ten seconds to reach the tracks, meaning the locomotive was only around 370 feet away (10 x 37 feet.) If Mr. Corl's vehicle was moving as slow as 2 mph (2.933 feet per second), it would have taken around five seconds to reach the tracks, meaning the locomotive was only around 185 feet away (5 x 37 feet.) If Mr. Corl's vehicle was moving as slow as 5 mph (7.333 feet per second), it would have taken a little over two seconds to reach the tracks, meaning the locomotive was merely a little over 74 feet away. At any speed faster than that, the locomotive would have been even closer. The photographs prove that the locomotive would not have been obstructed by vegetation at any of those distances.

at best a few hundred feet away, and (5) then drove forward with his head still below the dashboard. This is not a reasonable inference and it is not only unsupported, but directly contradicted by the evidence.

All of this is a long of way of stating that neither Plaintiff nor the Court of Appeals was able to cite any facts in the record showing the view was obstructed by vegetation fact or indicating Mr. Corl was looking for, or in the direction of, the locomotive. Plaintiff has no right to a jury where the physical facts contradict Plaintiff's claim and merely hoping a trier of fact would disbelieve the evidence does not meet Plaintiff's obligation to present evidence.

The Court of Appeals decision directly conflicts with longstanding Michigan Supreme Court precedent. As such, the decision was clearly erroneous, will result in manifest injustice, and, unless reversed, could have major significance in Michigan jurisprudence. Accordingly, Defendants respectfully request that this Court grant the Application for Leave to Appeal.

Respectfully Submitted,

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